

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ADAIR, DAVID A,)	
LOREDO, DORA E AND ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
Plaintiffs,)	
vs.)	
)	
SABHARWAL, HEMANT MD,)	
REUBEN, LAWRENCE M,)	CAUSE NO. IP02-0284-C-T/K
CREDITORS SERVICE OF INDIANA)	
INC,)	
)	
Defendants.)	

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DAVID A. ADAIR and
DORA E. LOREDO,

Plaintiffs,

vs.

HEMANT SABHARWAL, M.D.,
LAWRENCE M. REUBEN and
CREDITORS' SERVICE OF
INDIANA, INC.,

Defendants.

Defendant Hemant Sabharwal, M.D. filed a motion to dismiss Plaintiffs' Count III for failure to state a claim upon which relief can be granted. Plaintiffs oppose the motion. The court rules as follows.

Plaintiffs, David Adair and Dora E. Loreda (“Plaintiffs”), brought this suit on behalf of themselves and others against Defendants Hemant Sabharwal (“Defendant

¹This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

Sabharwal”), Lawrence M. Reuben, and Creditors’ Service of Indiana, Inc. (“CSI”), regarding Defendants’ efforts at collecting debts for unpaid medical services. (Pl.’s Br. at 1.) Count III of the Complaint was brought against all of the Defendants for their alleged commission of statutory deception. Ind. Code § 35-43-5-3(a)(2). On April 26, 2002, Defendant Sabharwal filed his motion to dismiss Count III for failure to state a claim and a memorandum of law in support. Plaintiffs oppose the motion.

The following are allegations of the Complaint: Defendant Sabharwal is a doctor licensed to practice medicine in Indiana. In March 2001, Plaintiff Adair obtained medical services from him. Sometime thereafter Plaintiff Adair’s account was assigned to CSI for collection. On or about February 4, 2002, CSI sent a dunning letter to Plaintiff Adair, demanding payment on his account with Defendant Sabharwal. The dunning letter stated that Plaintiff Adair’s balance on his account with Defendant Sabharwal was \$ 6,410.91, including an undisclosed collection fee equal to fifty percent of the principal on his account. This collection fee was added before the account was assigned to CSI for collection and is not reasonably related to the costs associated with collecting a consumer’s debt. Defendant Sabharwal forwarded the documents for Plaintiff Adair’s account to CSI when the account was assigned for collection.

On or about December 22, 2000, Plaintiff Loreda obtained medical services from Defendant Sabharwal. Sometime after that, her account was assigned to CSI for collection. Sometime before November 19, 2001, CSI sent a letter to Plaintiff Loreda in which the alleged balance due included an undisclosed collection fee of fifty percent of the

principal on her account with Defendant Sabharwal. Defendant Sabharwal added this fifty percent collection fee prior to assigning Plaintiff Loredó's account to CSI for collection. Defendant Sabharwal forwarded the documents for Plaintiff Loredó's account to CSI at the time he assigned her account for collection.

Count III, Section One states that it is brought only against Defendant Sabharwal for alleged commission of statutory deception. Section One alleges that Defendant Sabharwal sent a statement of account purporting to include an additional fifty percent "collection fee" over and above any sums owing for services in violation of Indiana Code § 35-43-5-3(a)(2). Count III, Section Two is brought against Defendant Sabharwal and CSI for their alleged commission of statutory deception. Section Two alleges that Defendant Sabharwal directed CSI to send, and CSI sent, the dunning letter, all in violation of Indiana Code § 35-43-5-3(a)(2). Count III, Section Three alleges that Defendants' attempt to collect percentage-based collection fees and attorney's fees in the state court action against Plaintiff Loredó constitutes the commission of statutory deception in violation of Indiana Code § 35-43-5-3(a)(2).

Count III, Class Allegations, Section One is brought by Plaintiffs on behalf of themselves and a class of people consisting of: (1) all natural persons with Indiana addresses; (2) to whom Defendant Sabharwal sent an invoice which contained an amount for "collection fees" based on a percentage of the consumer's debt; (3) on or after a date two years prior to the filing of this action. Section Two is brought by Plaintiffs on behalf of themselves and a class of people consisting of: (1) all natural persons with Indiana

addresses; (2) to whom CSI sent a dunning letter which contained an amount for collection fees based on a percentage of the consumer's debt; (3) on or after a date two years prior to the filing of this action. Section Three is brought by Plaintiff Loredó only, on behalf of herself and a class of people consisting of: (1) all natural persons with Indiana addresses; (2) against whom Defendants filed a lawsuit which requested collection fees and attorney's fees based on a percentage of the consumer's principle debt; (3) on or after a date two years prior to the filing of this action.

II. DISCUSSION

A. Standard of Review

The standard of review for a Rule 12(b)(6) motion to dismiss for failure to state a claim is a stringent one. Under federal notice pleading, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). As the Supreme Court said long ago, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When ruling on a 12(b)(6) motion, the court must view the complaint in the light most favorable to the plaintiffs and take the allegations of the complaint as true. *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996).

Both the Supreme Court and Seventh Circuit have recently said that plaintiffs are not required to plead the facts or the elements of the claim, unless the claim falls within the exceptions in Rule 9, which are inapplicable here. *Swierkiewicz v. Sorema*, 534 U.S. 506, ---, 122 S. Ct. 992, 998 (2002); *Walker v. Thompson*, 288 F. 3d 1005, 1007 (7th Cir. 2002); see also *Strong v. David*, — F.3d ---, No. 01-3264, 2002 WL 1610797 (7th Cir. July 23, 2002) (“Federal courts. . . use notice pleading, under which the nature of the claim need only be sketched, and a pleader need not match facts against the elements of a legal theory.”) (citing *Swierkiewicz*); *Higgs v. Carver*, 286 F. 3d 437, 439 (7th Cir. 2002) (“A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts.”).

Defendant Sabharwal cites *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984), and *International Medical Group, Inc. v. American Arbitration Ass’n*, 149 F. Supp. 2d 615, 623 (S.D. Ind. 2001), for the proposition that a complaint must contain either direct or inferential allegations on the material elements of a claim. He cites *Herdich v. Pegram*, 154 F.3d 362 (7th Cir. 1998), *rev’d on other grounds*, 530 U.S. 211 (2000), *Sutliff*, and *International Medical Group*, for language which states that unsupported conclusory allegations are insufficient to withstand a motion to dismiss. The court is not persuaded that these are the appropriate standards by which to judge Plaintiffs’ Complaint.

Sutliff was abrogated by *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774

(7th Cir. 1994), which states, in relevant part:

again we remind that a plaintiff is not required to plead the particulars of his claim. The inference of a heightened pleading requirement in antitrust cases that the court in *Boston & Maine Corp. v. Town of Hampton*, supra, 987 F.2d [855], 864 [1st Cir. 1990], drew from our opinion in *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984), cannot be considered authoritative after *Leatherman [v. Tarrant County Narcotics Intelligence and Coordination Unit]*, 507 U.S. 163, ----, (1993)]. Properly understood, *Sutliff* is simply another of those cases in which the plaintiff pleaded himself out of court.

Id. at 782. Furthermore, the heightened standard from the cases relied on by Defendant Sabharwal is inconsistent with the language in Rule 8(a)(2), *Conley*, the Supreme Court's recent decision in *Swierkiewicz*, and the more recent Seventh Circuit opinions in *Walker*, *Strong*, and *Higgs*. These cases reiterate that there is no requirement that a plaintiff plead particular facts or allegations in a complaint.

B. Analysis

Defendant Sabharwal argues that the patient contracts he provided to the Plaintiffs should be considered by the court in ruling on the 12(b)(6) motion. He asserts that, "If a document is either specifically referenced or implicitly incorporated into the complaint, and central to the plaintiffs' claim, the court may consider that document as part of the pleading if it is attached to the defendant's 12(b)(6) motion." (Def.'s Mem. Law Supp. Mot. Dismiss at 2.) The Complaint states that the documents for Plaintiffs' accounts were forwarded to

CSI at the time Defendant Sabharwal assigned their accounts to CSI for collection. The court believes this language arguably references the patient contracts. Also, these contracts are an integral part of Plaintiffs' relationship with Dr. Sabharwal, and Plaintiffs do not object to their consideration by the court. Therefore, the court will consider the patient contracts in deciding the present motion.

Defendant Sabharwal contends that Count III, Section One fails to state a claim for statutory deception based on his statements of accounts because it makes only conclusory allegations that they contain false or misleading statements. As stated previously, there is no need for a plaintiff to plead all the elements in the case or match facts to every element. *See, e.g., Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S. Ct. 992, 998 (2002); *Walker v. Thompson*, 288 F. 3d 1005, 1007 (7th Cir. 2002). In addition, the pertinent language in the patient contracts states:

IN THE EVENT THAT I DEFAULT ON PAYMENT OF MY ACCOUNT AND THE DEBT IS ASSIGNED TO A THIRD PARTY FOR COLLECTION, THE UNDERSIGNED ASSUMES AND AGREES TO PAY FOR ALL COLLECTION FEES PAID OR INCURRED BY DR. HEMANT SABHARWAL. COLLECTION AGENCY FEES CAN BE UP TO AN ADDITIONAL FIFTY PERCENT OF THE AMOUNT TURNED OVER FOR COLLECTION. IN THE COURSE OF COLLECTION OF THE AMOUNT DUE, AN ATTORNEY MAY BE ENGAGED BY DR. SABHARWAL OR BY THE COLLECTION AGENCY TO ASSIST WITH COLLECTION. THE UNDERSIGNED AGREES TO PAY REASONABLE ATTORNEY FEES, COURT COSTS AND OTHER COSTS PAID OR INCURRED BY DR. SABHARWAL OR OUR COLLECTION AGENCY WHILE COLLECTING ON THE AMOUNT DUE.

(Def.'s Mem. Law Supp. Mot. Dismiss, Exs. F & G.).

This quoted language provides that the patient agrees to pay the collection fees “paid or incurred by” Defendant Sabharwal. Plaintiffs could be entitled to relief under Indiana’s statutory deception law if the facts show that Defendant Sabharwal sought to recover from them through the statements of accounts amounts in excess of the collection fees actually paid or incurred by him. Defendant Sabharwal contends that the patient contracts are factual proof that none of the written statements in the statements of accounts are false or misleading. But there is no evidence in the record to establish that the collection fees sought by Defendant Sabharwal were the actual amounts he paid or incurred. Summary judgment, rather than a Rule 12(b)(6) motion, is the proper method to test the sufficiency of the evidence before trial. Because there exist facts consistent with the Complaint’s allegations which, if true, could entitle Plaintiffs to relief on Count III, Section One, the motion to dismiss should be denied as to the claim asserted therein.

Defendant Sabharwal contends that Count III, Section Two fails to state a claim for statutory deception against him for the dunning letter because it fails to show that he wrote the dunning letter or that the letter contains any false or misleading statements. Indiana Code § 35-41-2-4 states that “[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. . . .” Plaintiffs’ allegation that Defendant Sabharwal “directed” CSI to send the dunning letter is sufficient under notice pleading standards to satisfy this statutory provision. In addition, if the facts show that the collection fees sought in the dunning letters were not the amounts actually

paid or incurred by Defendant Sabharwal, then Plaintiffs could prevail on their claim in Count III, Section Two. Thus, the motion to dismiss should be denied as to that claim.

Next, Defendant Sabharwal contends that Count III, Section Three fails to allege facts showing that Defendant Sabharwal is a debt collector under the FDCPA, that he made Exhibits C, D, and E,² or that these exhibits contain any false or misleading statements. Despite language in the Complaint's paragraph 91, it appears that Count III, Section Three asserts a claim for statutory deception only, and Plaintiffs have clarified that they pursue no claim under the FDCPA in Count III, Section Three. It would seem that Defendant Sabharwal is a creditor rather than a debt collector in any event such that no FDCPA claim could be maintained against him.

As for Defendant Sabharwal's argument that the Complaint fails to allege facts showing that Exhibits C, D, and E attached to the Complaint contain any false or misleading statements. Plaintiff's claim is based on an attempt to collect percentage-based collection fees and attorney's fees. If the facts show that Defendants attempted to recover collection fees and attorney's fees in the state court action against Plaintiff Loreda which were unrelated to the fees actually paid or incurred by Defendant Sabharwal, then Plaintiff Loreda could be entitled to relief on her statutory deception claim in Count III, Section Three. So, this claim is not subject to dismissal under Rule 12(b)(6).

² These exhibits are the complaint and attached exhibits filed in the state court action brought by CSI as assignee of Dr. Sabharwal against Ms. Loreda, and the Application For Default Judgment and Affidavit For Attorney's Fees, also filed in that case.

Finally, Defendant Sabharwal contends that Count III, Class Allegations fails to state a claim against him for the same reasons that the claims of Plaintiffs Adair and Loreda are insufficient. Because the court has determined that the individual claims are sufficient under Rule 12(b)(6), this contention, too, must fail.

III. Conclusion

For the foregoing reasons, Defendant Sabharwal's motion to dismiss Plaintiffs' Count III for failure to state a claim upon which relief can be granted is **DENIED**.

ALL OF WHICH IS ORDERED this 16th day of August 2002.

John Daniel Tinder, Judge
United States District Court

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